

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NORTHWESTERN CORPORATION D/B/A)	
NORTHWESTERN ENERGY)	
)	
Employer)	
and)	Case 19-UC-261685
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 44)	
)	
Petitioner)	
_____)	

**NORTHWESTERN CORPORATION D/B/A NORTHWESTERN ENERGY’S BRIEF IN
SUPPORT OF REVERSAL OF THE REGIONAL DIRECTOR’S DECISION AND
ORDER CLARIFYING UNIT UPON BOARD GRANT OF REVIEW**

NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) hereby submits this Brief in Support of Reversal of the Regional Director’s Decision and Order Clarifying Unit Upon Board Grant of Review in this matter. Specifically, the Board has granted review of whether the Regional Director correctly found that a newly-created Controller position performs the same basic functions as the Octage Management System (OMS) Dispatcher bargaining-unit position to warrant clarifying the Controller position properly viewed as already included in the Unit. For the reasons set forth below and established at the evidentiary hearing, the Regional Director’s Decision relating to this issue should be reversed and the Controllers should be found to be properly excluded from the bargaining unit at issue.

I. Introduction

On August 10, 2020, the parties participated in an evidentiary hearing in connection with the Union’s Unit Clarification Petition, filed on June 15, 2020. The hearing focused on whether a newly-created job classification at NorthWestern—the "Controller" classification—should remain in the bargaining unit. The Regional Director found that the relevant bargaining unit should be

clarified to include the Controller classification. This decision was based on the Regional Director's conclusion that the Controllers are not managerial employees, and that they are performing the same work that was previously performed by another classification—the "OMS Dispatcher" classification.

In reaching his decision relating to the sole issue subject for review (i.e., whether the Controllers are performing the same work previously performed by the OMS Dispatcher classification), the Regional Director relied in part on clearly erroneous factual findings. The Regional Director improperly and entirely discounted testimony that an OMS Dispatcher spent 60% of his or her day performing "mobile dispatch" work. This was important testimony, because it is uncontroverted that Controllers do not perform *any* mobile dispatch work, meaning most of their day is spent doing something different than an OMS Dispatcher used to do. The Regional Director wrongly concluded that the only former OMS Dispatcher to testify at the hearing was only testifying about what her job duties were at a time when the department was short-staffed. The witness did not limit her testimony in this way.

For the reasons stated below, the Regional Director's Decision and Order should be reversed and the Controllers should be found to be properly excluded from the bargaining unit at issue.

II. Summary of Evidence

A. Background Leading to the Union's Representation of OMS Dispatchers

NorthWestern is a utility company that delivers gas and/or electric service to customers in Montana, South Dakota and Nebraska (Tr. 17:13-14). The Union represents employees in NorthWestern's line operations, electric operations, and some gas operations. (Tr. 14215-18).

NorthWestern's service area is divided into eight divisions, and each division has a manager (Tr. 144:3-13).

In 2011 or 2012, NorthWestern began communicating its plan to transition to a "control center" operating model (Tr. 73:23-74:22). In other words, decisions that were historically made at the local level were instead going to be made from a centralized control center (Tr. 49:10-50:14).

In 2014, NorthWestern purchased and began using software called InService, which allowed NorthWestern to perform the mobile and OMS functions (Tr. 29:21-24). The "mobile" component of the InService product is the component that connects the work of the company to the representatives performing the work in the field (Tr. 29:18-30:4). Before InService, NorthWestern sent its outage orders to its employees in the form of paper on a fax machine (Tr. 49:10-50:4). InService provided NorthWestern with the ability to send those orders directly to field representatives in their vehicles (Tr. 49:10-50:23).

When NorthWestern purchased InService, it knew that the "mobile" function would be long-lasting (*Id.*). However, the outage management (or "OMS") function was always meant to be temporary (Tr. 29:18-30:17).

When NorthWestern began using InService in 2014, it created two new job classifications: the Mobile Dispatchers and the OMS Dispatchers (Tr. 29:18-24). Generally, the Mobile Dispatchers performed the "mobile" functions summarized above, and the OMS Dispatchers performed the OMS functions. OMS Dispatchers were, however, cross-trained and typically spent a majority of their day on "mobile" tasks (Tr. 29:18-31:7; 178:21-179:19). Originally, these two classifications were not represented by a union. In 2017, the Mobile Dispatchers and the OMS Dispatchers filed a representation petition and on November 21, 2017, the Union was certified as the collective bargaining representative for these employees (Tr.20:9-17; Jt. Exh. 2). The parties

bargained, and ultimately executed a Memorandum of Understanding dated March 18, 2019 incorporating the OMS Dispatchers and Mobile Dispatchers into the existing CBA (Jt. Exh. 3).

The Memorandum of Understanding contains two articles; one for the Mobile Dispatcher; and one for the OMS Dispatcher (Tr. 29:14-17; Jt. Exh. 3). The reason these two positions were separated into different articles in the MOU was that NorthWestern made it very clear to the union, as it had to the impacted employees before those employees were represented by the Union, that the OMS Dispatcher positions were temporary and in the relatively near future would be eliminated (Tr. 28:18-30:25; 31:19-32:2).

Minutes from the parties' last two bargaining sessions confirm that the Union understood that the OMS classifications were temporary and would be going away. (Emp. Exhs. 8, 9). In fact, during a December 20, 2018 bargaining session, Bill Ryan, Business Agent for the Union, noted that the Union understood that "OMS is going away." (Emp. Exh. 8, p. 2). During a February 6, 2019 bargaining session, Jason Merkel, NorthWestern's general manager of operations, commented that ADMS would automate many of the errors the parties saw in the OMS system, and that the OMS system was one of the shortest lived technologies that the Company had implemented (Emp. Exh. 9, p. 3).

B. NorthWestern's Planned Multi-Year Transition to Centralized Control

NorthWestern is currently in the early stages of a four-year transition plan (Emp. Exh. 6, p. 3). NorthWestern has fully completed phase one, and is working toward phase two (Tr. 65:16-23). Each phase requires additional Controller training (Tr. 72:4-6). In the past, decisions surrounding simple outages, such as those affecting a single customer, could be made by a journeyman in the field (Tr. 45:11-20). Decisions involving more complex or involved outages were made by supervisors or engineers (Tr. 46:2-6). Once phase two is fully implemented, the

main responsibility for the distribution system will transition from where it has been historically (at the field level) to the control center (Tr. 117:2-12). Once that transition occurs, a switch in the field will not be opened or closed unless and until it is approved by a Controller at the control center (Tr. 117:13-25).

Phase two is not fully realized. Controllers are not yet making decisions from a centralized location (Tr. 151:5-17). The Controllers are, however, currently undergoing an intense and lengthy training process covering numerous subjects (Emp. Exh. 6, p. 22; Emp. Exh. 7). Mr. Merkel described NorthWestern's current place in the four-phase transition as "somewhere between box 1 and 2" (meaning phase one and phase two) (Tr. 65:16-23). Already, a majority of a Controller's day is spent understanding the new information they have access to and applying that information with critical reasoning (Tr. 114:22-115:7). Controllers are also currently spending time reviewing historical outages to interrogate those outages and determine if the restoration times and sequence of restoration was accurate (Tr. 114:22-115:7). Mr. Merkel testified that (as of the time of the evidentiary hearing) NorthWestern is 90 days into this stage of the transition (Tr. 111:19-21).

Kelly Howery, a former OMS Dispatcher and current Controller, testified that when she was an OMS Dispatcher, she spent sixty percent of her day on "mobile work" and forty percent on OMS work (Tr. 175:19-176:13). Now, as a Controller, she does not do *any* mobile work (Tr. 179:24-180:5). Instead, she spends sixty percent of her day preparing for the next "go live" date as a Controller (Tr. 180:6-9). Specifically, she is obtaining an understanding of how decisions impact the system—the same sort of decisions historically made by managers, supervisors, and engineers, and that she will need to be make as a Controller in the future (Tr. 180:17-22).

C. OMS Dispatcher's Job Duties and Controller Job Duties

An OMS Dispatcher's main job was to monitor and record on the system by representing in a virtual world, the state of the actual system (Tr. 100:17-23). Mr. Merkel likened it to a command center during World War II. Individuals in the command center would get notes or be told information and, based on that information, they would move figurines (tanks or soldiers) on a large map to visually represent what was actually happening on the battlefield (Tr. 31:3-44:16). In other words, the OMS Dispatchers received information from the field and recorded that information. They were not making decisions (Tr. 44:17-49:8). The decisions about what to do in the field were being made by others—managers, supervisors, engineers, and in limited circumstances, journeymen (*Id.*). The OMS Dispatchers were not responsible for understanding where an outage existed, but instead were merely responsible for representing it on a map based on information they received from others (Tr. 139:3-11).

A Controller, on the other hand, will have to exercise independent discretion in performing his or her job duties (Tr. 76:4-10). For example, a Controller will have to create switch plans, a task previously performed by engineers and managers in the field (Tr. 152:7-13). A Controller will also direct bargaining unit employees with respect to plan switching, large scale outages, and moving load (Tr. 60:12-25). Previously, OMS Dispatchers were not necessary to the completion of work in the field (Tr. 59:12-60:11). Rather, the OMS function existed solely to provide information to the customer (*Id.*).

Once the new control structure is fully implemented, employees in the field will be directed by Controllers in the control center (*Id.*). The Controllers will have to evaluate information and turn that information into action (Tr. 121:6-19). Controllers are projected to be performing all of these functions by the second quarter of 2021 (Tr. 121:6-122:13).

While Controllers will not make company policy, they will be responsible for assuring the actions of the company and those that they are directing adhere to the policies of NorthWestern (Tr. 135:22-136:2). Kelly Howery, a former OMS Dispatcher and current Controller, confirmed that as a Controller, she does not perform any mobile dispatching duties, which accounted for about 60% of a typical day as an OMS Dispatcher (Tr. 175:2-13). Ms. Howery further confirmed that as an OMS Dispatcher, she did not direct other employees to complete switching (Tr. 164:16-19). She testified that she understood as a Controller that she will be responsible for evaluating the situation and making those decisions (Tr. 164:16-25). She also testified that in preparation for applying for a role as a Controller, she obtained additional education (Tr. 176:23-177:5). Some of the cost of that additional education was reimbursed by NorthWestern, but she paid for the remainder out of her own pocket (Tr. 177:13-18).

D. Onboarding of Controllers

In the summer of 2019, NorthWestern hired eight Controllers (Tr. 99:2-8; 75:11-21). Four were current OMS Dispatchers, and four came from outside the company (Tr. 75:11-21). After the Controllers were hired, the go-live date for the transition to the ADMS software, which was anticipated to be in September of 2019, had to be delayed (Tr. 83:1-15). Mr. Merkel did not want to hire and train OMS Dispatchers, only to have those people laid off a short time later when the Controllers began performing their jobs (Tr. 83:1-84:18). The Union agreed to allow the four external candidates to work in the OMS Dispatcher position until the “go live” date for the Controllers. (Tr. 84:19-85:12). This agreement was memorialized in a letter from NorthWestern to the Union (Emp. Exh. 3). In the letter, NorthWestern made it clear to the Union that once the transition was complete, anticipated to be early January 2020, the eight individuals, along with all future employees, hired into the Controller position would be non-represented. (Emp. Exh. 3).

The Union never contacted NorthWestern with any questions or concerns after it received this letter (Tr. 85:24-86:3).

NorthWestern informed the Union on January 30, 2020 that it had gone live with its ADMS software and that, pursuant to the parties' October 2019 agreement, the Controllers would be non-represented. (Emp. Exh. 4). In May of 2020, the Union filed a grievance (193:14-24; Emp. Exh. 5). The Union expressed concerns that Controllers were doing OMS functions (Tr. 91:2-13). Mr. Merkel testified he did not really understand what the Union was grieving, and thought that the only possible grievance related to Section 2.08 of the parties' CBA (Tr. 92:1-8).

Section 2.08 addresses technological displacement and provides:

When as a result of technological change, new or revised job classifications are introduced, which result in the elimination of current bargaining unit positions, the Company will endeavor to place affected employees in alternate positions within the Company, if available, and will assist affected employees in acquiring the knowledge and skills necessary to qualify for these new or revised job classifications.

(Jt. Exh. 1, section 2.08).

There is no dispute that NorthWestern complied fully with the requirements of § 2.08 as it relates to the transition of OMS Dispatcher positions. Eventually, the Union filed the instant Unit Clarification Petition on June 15, 2020.

III. Argument and Analysis

A. Summary of Regional Director's Decision and Opinion

The Regional Director concluded that the Controller position must be included the bargaining unit which previously included OMS Dispatchers, and which currently includes the Mobile Dispatchers. Decision and Opinion, p. 13. In reaching this conclusion, the Regional Director noted that NorthWestern is in the early phases of a multi-year transition to a centralized control system. *Id.*, p. 11. When that transition is complete, Controllers will be making decisions

previously made by managers, supervisors, and engineers. Nonetheless, the Regional Director determined that the Controllers are currently performing unit work formerly done by the OMS dispatchers and should therefore remain in the unit. Decision and Order, p. 12. The Regional Director's decision is erroneous and should be reversed.

B. The Regional Director Committed Clear and Prejudicial Error By Finding That Controllers Perform the Same Work That OMS Dispatchers Historically Performed, Given That a Majority of an OMS Dispatcher's Day Was Spent Performing Mobile Dispatching Work, Which Controllers Do Not Perform.

In his Decision and Order, the Regional Director accused NorthWestern of misstating the testimony of Howery, the only former OMS Dispatcher to testify at the hearing. The Regional Director stated:

The Employer misstates testimony from a former OMS dispatcher who became a controller when it asserts that she stated that when she was an OMS dispatcher, 60% of her workday was spent doing mobile dispatch work and only 40% was OMS work. This employee testified that this was the case only because of a shortage of mobile dispatchers at the time that caused the OMS dispatchers to fill in for them. Thus, the Employer's argument that as a controller, she does not currently perform any mobile work is not relevant.

Decision and Order, p. 9, n.13.

NorthWestern did not misstate Howery's testimony. The transcript of the hearing establishes that the Regional Director committed clear error by both misstating this testimony and by discounting the relevance this testimony. The Union called only one witness to testify at the hearing: former OMS Dispatcher Kelly Howery. Ms. Howery worked as an OMS Dispatcher for 4.5 years. (Tr. 157:3-4). She explained on direct examination that when she was hired as an OMS Dispatcher, she performed both "mobile dispatching and outage related work." (Tr. 157:5-13). After Howery's direct testimony, the hearing officer asked several questions seeking clarification. For example, the Hearing Officer asked first for Howery to walk her through a typical day in the December 2019-January 2020 timeframe. (Tr. 172:25-173:14). Howery explained that they were

short staffed and that they were "*still* doing a lot of the mobile functions as well." (Tr. 173:10-11) (emphasis added). After this exchange, the Hearing Officer moved on to asked what Howery's job responsibilities were *generally* as an OMS dispatcher:

HEARING OFFICER CHEREM: Uh-huh. How much of your day, as on OMS dispatcher, would you say that you spend doing mobile work?

THE WITNESS: At that -- before -- we're talking before January, correct?

HEARING OFFICER CHEREM: Sure. Or just -- yeah. Pick a time --

THE WITNESS: I mean now --

HEARING OFFICER CHEREM: -- and tell me what --

THE WITNESS: --because now --

HEARING OFFICER CHEREM: -- time you're referring to.

THE WITNESS: Now, I don't do any mobile work.

HEARING OFFICER CHEREM: Right. So before when you were an OMS dispatcher, I understand now you don't do --

THE WITNESS: Yeah.

HEARING OFFICER CHEREM: -- any mobile work, but before --

THE WITNESS: So, it was --

HEARING OFFICER CHEREM: -- when you were an OMS dispatcher, how much of your time, would you say, that you spent on mobile work?

THE WITNESS: Maybe 60 percent -- 60/40, you know, depending on, you know, you didn't have a major storm or anything, those kind of things.

HEARING OFFICER CHEREM: And when you say 60/40, what do you mean?

THE WITNESS: 60 --

HEARING OFFICER CHEREM: Which is which?

THE WITNESS: 60 percent mobile, 40 percent OMS. So you know, a lot of it just depends on, you know, your weather, and if you get storms rolling in, those kind of things obviously that, you know, something like have or had their, you know, the gillion (sic) poles go down that October, you know, then you're doing 90 percent –

HEARING OFFICER CHEREM: Sure.

THE WITNESS: -- you know, so -- but for the most part I would say it's probably 60 percent mobile at that time, and 40 percent OMS.

(Tr. 175:2-176:13).

Nothing in Howery's testimony indicated that she was speaking only to a limited time during which her department was understaffed. In fact, when the Union's counsel had an opportunity to question Howery again, Howery confirmed that she was speaking about her entire time as an OMS Dispatcher:

Q And then when -- in response to the Hearing Officer's question, you talked about 60/40 mobile/OMS, was that in that period of October of 2019 to January of 2020 when you were understaffed, or was that throughout your time as an OMS dispatcher?

A That -- I mean, when I went to OMS, the idea was to get everybody cross-trained at that time so that you could actually just be in charge of everything for an area. But that philosophy, I think, as this control position evolved; they realized that that wasn't going to work. And so for me, as an OMS dispatcher -- *my whole time as an OMS dispatcher, I also mobile dispatched.*

(Tr. 178:21-179:7) (emphasis added).

To remove any doubt that Howery was speaking about her duties during her *entire* time as an OMS Dispatcher, the Employer's counsel again revisited the 60/40 split in job responsibilities:

Q BY MR. CECERE: Kelly, you indicated for you, prior to the time that you became a controller, about 60 percent of your day was comprised of doing what the mobile dispatcher's job -- basically, the mobile job, and 40 percent OMS. As a controller, I think you said you don't do any of the mobile dispatching anymore; correct?

Q So about 60 percent of your day is now freed up to do things that are going to be, eventually, required of a controller, correct?

A Correct.

Q And part of that is to prepare for the next Go Live date as a controller, correct?

A That's my understanding.

Q And as part of preparing for the next Go Live date, what you are doing in part is obtaining an understanding of how decisions impact the system, correct?

A Correct.

Q And those decisions are the sort of decisions that, historically, had been made out in the field by managers, supervisors, engineers; and going forward, those are the sort of decisions that you expect you will be making as a controller; is that correct?

A Yes. Yes.

(Tr. 179:24-180:22).

In short, Howery plainly testified that throughout her four and a half years as an OMS Dispatcher, she performed mobile dispatching work. When asked to estimate the amount of time she spent doing mobile dispatching work, she said those duties took up sixty percent of her day. She also testified that she no longer performs any mobile dispatching work as a Controller. Because this testimony was not limited to any particular time period, the Regional Director's description of her testimony is clearly erroneous.

Moreover, the fact that Howery now spends a majority of her day as a Controller doing things she did not do as an OMS Dispatcher is relevant and material, and Howery's testimony directly contradicts the Regional Director's finding that "the controllers are currently doing the same work previously done by the OMS dispatchers." Decision and Order, p. 11. It is true that, presently, the Controllers continue to perform the monitoring and reporting tasks previously perform by OMS Dispatchers. But the un rebutted testimony at the hearing was that these tasks previously took up less than half of an OMS Dispatcher's day.

For these reasons, there is no evidentiary basis to support the Regional Director's finding that Controllers' work remains unchanged from that work performed by OMS Dispatchers. Controllers are temporarily performing *some* duties previously performed by OMS Dispatchers that took up less than half of the Controllers' day. The record also establishes that in the near future, Controllers will be exercising discretion and making decisions that managers, supervisors, engineers previously made. Controllers have more onerous training and education requirements than OMS Dispatchers did, and Howery, a Controller and former OMS Dispatcher, prepared for the increase responsibility attendant to her new role by completing additional education outside of work, partially at her own expense.

The Regional Director's erroneous findings regarding Howery's testimony caused prejudicial and reversible error. For this reason, the Regional Director's decision and opinion should be reversed.

IV. Conclusion

The Regional Director's Decision and Order is founded upon erroneous factual and legal findings and should be reversed. The evidence at the hearing established that mobile dispatch work accounted for approximately sixty percent of an OMS Dispatcher's day, and Controllers no longer perform any of those mobile dispatch duties. While Controllers currently perform some job duties that were previously performed by OMS Dispatchers, they are aligned with management. Controllers are currently training and preparing to take on greater responsibilities. When the transition to centralized control is complete, a Controller will be evaluating data, directing field resources, and developing switching plans. They will have the final say about whether a switch is opened or closed in the field. Whereas these types of decisions were previously made by managers, supervisors, or engineers in the field, Controllers will now be making the same

decisions themselves from a centralized control center. These tasks do not resemble the tasks performed by OMS Dispatchers.

For the reasons discussed in this Brief in Support of Reversal of the Regional Director's Decision and Order Clarifying Unit Upon Board Grant of Review in this matter, NorthWestern respectfully requests that the Regional Director's Decision relating to this issue be reversed and the Controllers found to be properly excluded from the bargaining unit at issue.

Dated: February 12, 2021

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